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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

v.

THE STATE OF MISSISSIPPI, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC., *AMICUS CURIAE*, IN SUPPORT OF APPELLEES

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BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC., *AMICUS CURIAE*, IN SUPPORT OF APPELLEES

INTEREST OF *AMICUS CURIAE*

Southeastern Legal Foundation, Inc. ("Southeastern") is a non-profit corporation organized for the purpose of advancing public interest viewpoints in adversarial proceedings involving significant issues. Toward that end, Southeastern has participated as *amicus curiae* in a number of cases before this Court over the past five years.

Mississippi is one of the nine states[1] in which South-

[1] Southeastern mainly directs its attention to matters involving Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

eastern takes a special interest, and many of Southeastern's supporters reside there. Southeastern was active in this case as the only *amicus curiae* before the district court below. Now, after having urged this Court to note probable jurisdiction, Southeastern wishes to present its views for the Court's consideration on the merits.

Southeastern agrees with appellees' view that the Public Utility Regulatory Policies Act of 1978 ("PURPA") represents a form of federal control over the states which threatens the system of federalism and the individual liberties of the citizens of the states.

The parties to this appeal have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

The future relationship between the states and the federal government can be influenced by the Court's decision in this appeal. More than one isolated instance of improper use of congressional power is at stake. A new form of federal regulation appears in PURPA which must be rejected as unconstitutional before it can become an entrenched practice leading to the potential demise of our federal system.

Congress has mistakenly asserted its Commerce Power over a subject not intended to be reachable by that power—the states' sovereign act of governance. The function of governing itself is neither a form of interstate commerce nor an "activity affecting commerce" in any constitutional sense.

The form of regulation adopted by Congress in PURPA can be described as "commandeering federalism." By ordering the states to perform actions at the direction of the federal government, PURPA deprives the states of their independence and undermines their ability to function, as intended by the Framers, in the federal system. The rights and liberties of the people, protected and preserved by the plan of the Constitution, are likewise undermined by the shift of power to the federal government which results from the scheme of regulation reflected in PURPA. Both our system of federalism and the Tenth Amendment present a barrier against the aggrandizement of congressional power contemplated by PURPA.

No justification for PURPA put forward by appellants is adequate to warrant reversal of the district court's decision. Nonexercise of the preemption power does not suggest deference to the states. Furthermore, preemption of longstanding state functions was hardly a certain alternative in light of the political consequences of such action. Finally, reliance upon a claim of "emergency" cannot be accepted when true emergency legislation is, in fact, not enacted.

ARGUMENT

I.

PURPA IMPACTS SOVEREIGN STATE GOVERNMENTAL ACTIONS, NOT INTERSTATE COMMERCE, AND THUS IS UNCONSTITUTIONAL.

In adopting PURPA, Congress mistakenly relied upon its Commerce Power. Congress assumed that PURPA was a regulation of interstate commerce in that it involved the regulation of energy, Section 2 of PURPA, 16 U.S.C. (Supp. III) § 2601, but PURPA does not regulate directly energy or commerce in energy. Instead, PURPA regulates sovereign state governmental activities which, by their very nature, are not subject to the Commerce Power.

Although the Commerce Power is broad, extending even to "activities affecting commerce," *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S.Ct. 2352, 2360 (1981) ("*Virginia Surface Mining*") (quoting *Perez v. United States*, 402 U.S. 146, 150 (1971)), it is inapplicable where sovereign state governmental actions are the object of congressional regulation. In recent years, several challenges have been made to Commerce Power legislation which has interfered with or eliminated state regulation over particular matters of commerce. The Court has had occasion to hear some of these cases, but until now has not been faced with legislation utilizing the regulatory scheme embodied in PURPA.

Most of the recent Commerce Power challenges relied on the Tenth Amendment and basically assumed

the existence of an otherwise valid exercise of the Commerce Power. This case is particularly significant because it presents a serious threshold question as to the very existence of a Commerce Power basis for PURPA.

In *Fry v. United States*, 421 U.S. 542 (1975) ("*Fry*"), there was no need to consider at length the threshold question of the existence of a proper subject for Commerce Power legislation. The petitioners there presented a Tenth Amendment argument to the effect that the Commerce Power could not be utilized when it interfered with sovereign state functions. *Id.* at 547. Similarly, in *National League of Cities v. Usery*, 426 U.S. 833 (1976) ("*Usery*"), an otherwise valid exercise of the Commerce Power was assumed and the appellants argued for an affirmative limitation upon the Commerce Power arising from the Tenth Amendment and federalism. *Id.* at 841.

During this past term, the Court considered the constitutionality of certain provisions of the Surface Mining Control and Reclamation Act of 1977. From the Court's opinions in *Virginia Surface Mining*, 101 S.Ct. at 2359, and the companion case of *Hodel v. Indiana*, 101 S.Ct. 2376 (1981), it is evident that the very existence of interstate commerce as a justification for the exercise of congressional power was one of the issues. Finding rational Congress' determination that the Surface Mining Act was directed at an activity affecting interstate commerce, the Court turned its attention to an application of the Tenth Amendment to the Act.

The Surface Mining Act did not involve congressional regulation aimed directly at sovereign state governmental actions. Instead, it directly regulated the ac-

tivities of private individuals and businesses. Thus, the Surface Mining Act was considered by the Court to be unlike a federal regulatory scheme which commandeered the governmental processes of the states and compelled them "to enact and to enforce" a federal program. *Virginia Surface Mining*, 101 S.Ct. at 2366 (referring to Environmental Protection Agency regulations rejected by a number of U.S. Courts of Appeals).

Unlike the Surface Mining Act, which the Court described, 101 S.Ct. at 2367, as giving the states an option to establish their own surface mining control programs, but which did not force states to do anything, PURPA issues commands to the states. Whereas the Surface Mining Act presumed direct federal control and regulation over strip mining if the states did not exercise the regulating option given to them, the achievement of PURPA's goals is dependent entirely upon federally mandated state regulation of energy and utilities, without direct federal regulation of those matters.

Thus, the Surface Mining Act and PURPA are distinctly different forms of congressional regulation. The former acts directly upon the commerce sought to be controlled. The latter, PURPA, acts directly to control and regulate state governmental actions which are not commerce.

A literal application of the Court's view that the Commerce Power reaches "activities affecting commerce" could submerge virtually every imaginable act of a state government under a sea of interstate commerce. Even though the choice of a state as to "its own seat of government" could be considered to affect interstate commerce, the Court has described the power

to make such a decision as a matter of essential and peculiar state power. *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911). Thus, there are some actions of a state which are not reachable by the Commerce Power, not merely because the Tenth Amendment protects them, but because those activities do not constitute interstate commerce in the sense of the Commerce Clause.

The basis for such an analysis lies in the system of federalism embodied in the Constitution. That sovereign state governmental actions might be synonymous with interstate commerce does not fit the structure of the federal union laid out by the Framers. This was recognized by the Ninth Circuit in *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977), *reinstated in part*, 566 F.2d 665 (9th Cir. 1978), where the court stated

> [t]he *power of states over commerce* has no more been recognized as *commerce* than has the *power of Congress which is derived from the Commerce Clause*. Each find their source in the Constitution. Both are of the same family and genus, although not of the same species. The power of the states must yield to Federal power in order to effectuate Federal supremacy, not because the power of the states is commerce. This distinction between commerce and governmental power to regulate commerce, we suggest, was recognized by Mr. Chief Justice Hughes when he observed, "The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several states." *Santa Cruz Co. v. Labor Board*, 303 U.S. 453, 466 . . . (1937). We also

> believe that Mr. Justice Harlan recognized this distinction in *Maryland v. Wirtz*, . . . 392 U.S. [183] at 196 . . . [(1968)], when he quoted Mr. Chief Justice Hughes' observation to demonstrate that the Commerce Power would not disable the Court from preventing "the utter destruction of the State as a sovereign political entity."

It is precisely because PURPA directs congressional power at the "power of states over commerce" instead of interstate commerce itself, that PURPA represents an invalid exercise of the Commerce Power. The activities regulated by PURPA are uniquely governmental. Private persons or organizations cannot legislate, set regulatory policy, decide issues of standing or provide judicial remedies. These activities involve exercises of sovereign state governmental power. Consequently, they are not proper subjects of congressional Commerce Power legislation.[3]

II.

PURPA UNDERMINES THE SOVEREIGN FUNCTIONS OF THE STATES THROUGH AN UNCONSTITUTIONAL SCHEME OF COMMANDEERING FEDERALISM.

A. Sovereign State Governmental Functions Are Subordinated Impermissibly By PURPA.

Congress devised a complex assortment of regulatory

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[3] If Mississippi were in the business of actually operating utilities, rather than regulating them, Congress would be able to di-

devices when it fashioned PURPA. Southeastern is primarily concerned with PURPA's features which impose demands and burdens upon the states in a way which undermines the constitutionally based system of federalism. Our focus is on those portions of Title I of PURPA, 16 U.S.C. (Supp. III) §§ 2611-2644, 42 U.S.C. (Supp. III) §§ 6801-6808; Section 210 of Title II of PURPA, 16 U.S.C. (Supp. III) § 824a-3; and Title III of PURPA, 15 U.S.C. (Supp. III) §§ 3201-3211, which undermine sovereign state governmental prerogatives.

The most obvious interference with state independence is Title II's Section 210 command that the state implement rules promulgated by the Federal Energy Regulatory Commission ("F.E.R.C."). 16 U.S.C. (Supp. III) §§ 824a-3. Under this section, the states must either carry out F.E.R.C.'s orders or be subjected to F.E.R.C.'s enforcement remedies in federal court. Enforcement will be carried out according to provisions of the Federal Power Act, 16 U.S.C. § 791a *et seq.*, or, if F.E.R.C. does not seek enforcement, may be requested from the federal courts by certain utilities, cogenerators or small power producers. 16 U.S.C. (Supp. III) § 824a-3(h).

The Section 210 scheme is not premised upon a choice by the states made in order to receive some

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rectly impose obligations upon the state *qua* utility operator. Mississippi would then stand on the same footing as California in United States v. California, 297 U.S. 175 (1936), where Congress was found to have Commerce Power over that state's operation of a railroad. Such conduct is similar to that which private enterprise could perform. *But cf.* United Transportation Union v. Long Island R.R., 634 F.2d 19 (2d Cir. 1980) (a railroad can constitute an integral governmental function in the Tenth Amendment sense), *cert. granted*, 101 S.Ct. 3107 (1981).

compensating federal financial aid, or in light of a clear congressional determination to regulate directly if the states choose not to regulate. Rather, Congress has simply decided to use the states for the performance of a desired regulatory function.

Titles I and III of PURPA also impose demands for affirmative conduct upon the states. In both Titles, PURPA requires state utility regulatory agencies to act affirmatively by considering for adoption various federal substantive standards which PURPA treats as supplementing state law. 16 U.S.C. (Supp. III) § 2621; 15 U.S.C. (Supp. III) § 3203. Incidental to the duty of considering standards, PURPA imposes upon the states a variety of additional requirements.[3]

All of these commands interfere with the independent decision-making functions of the states and their utility regulatory commissions. Rather than attending to matters of their own choice or responding to citizens whom they serve, state officials must divert time and

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[3] These conditions include procedural requirements and rules in the consideration of the standards, 16 U.S.C. (Supp. III) §§ 2621-2625, 15 U.S.C. (Supp. III) §§ 3203 and 3204; the creation of standing for certain persons to intervene in rate-related proceedings, 16 U.S.C. (Supp. III) § 2631, 15 U.S.C. (Supp. III) § 3205; the preparing and filing of reports with appellant Secretary of Energy according to deadlines, 16 U.S.C. (Supp. III) § 2626, 15 U.S.C. (Supp. III) § 3209; and the completion of the consideration of the standards by a certain date, 16 U.S.C. (Supp. III) §§ 2622 and 2623, 15 U.S.C. (Supp. III) § 3203. In specified circumstances, utilities are liable for costs incurred by intervenor consumers who participate in the standards consideration proceedings, 16 U.S.C. (Supp. III) § 2632, and they are, of course, subject to whatever requirements the state regulatory agencies must impose in order to comply with PURPA.

resources in order to perform the functions imposed upon them by PURPA.

PURPA also presumes to interfere with the independence of state judiciary systems and state legislatures. Enforcement mechanisms in 16 U.S.C (Supp. III) § 2633 and 15 U.S.C. (Supp. III) § 3207 deprive state courts of their traditional prerogative of deciding questions of standing and order them to grant to the Secretary of Energy the status of *amicus curiae* in PURPA standards review cases.

State legislatures, which have exercised their sovereign power in the past to shape remedies and standing in state courts, are now deprived of that prerogative in the PURPA arena. Additional burdens may also be imposed upon legislatures in order to assist state regulatory agencies and courts in complying with the mandates of PURPA. Such burdens include possible expenditure of funds and adjustments in taxation to provide for those funds. While the Secretary of Energy may provide grants to states to assist them in complying with PURPA, 42 U.S.C. (Supp. III) § 6807, these grants are not assured and certainly cannot be regarded as a form of Spending Power *quid pro quo*.

Taken as a whole, PURPA does not invite cooperation by the states. It does not ask them to join together with the federal government to address a problem. PURPA must be seen for what it actually does. Going beyond mere coercion, PURPA clearly commands the states to perform to the tune of the federal government. In this sense, the district court was quite correct when it saw that PURPA would reduce the State of Mississippi to the role of a "robot" or "lackey." The commandeering federalism utilized by

PURPA is, as the district court perceived, simply not permitted by the Constitution.

B. PURPA Undermines the Federal System Which Assures The Independence Of The States And The Rights Of Their Citizens.

Ten years ago Justice Black wrote eloquently of the proper relationship between the federal government and the states. Describing the concept of "comity" in terms reflecting principles of federalism, he spoke of

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . [O]ne familiar with the profound debates that ushered the Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." This concept does not mean blind deference to "States' Rights" anymore than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly inter-

> fere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

Younger v. Harris, 401 U.S. 37, 44-45 (1971). PURPA is an instance of the National Government's undue interference with the legitimate activities of the states. This interference is a step towards the elimination of the federal system. More such steps are inevitable unless the Court acts to close the gate to the forbidden path.

The system of federalism adopted by the Framers recognized that the states are "indestructible," *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868), that they are independent "within their own proper spheres," *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868), and that the federal and the state governments may neither destroy each other "nor curtail in any substantial manner the exercise of [each other's] powers." *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926). The Court has recognized that even where Congress has an "affirmative grant of legislative authority" to reach a particular subject matter, congressional action can still be voided "because the Constitution prohibits [Congress] from exercising [its] authority in . . . [the] manner" chosen. *Usery*, 426 U.S. at 845.

The closest analogy in federal case law to PURPA's regulation of the states can be found in decisions addressing the validity of Environmental Protection Agency regulations which compelled specific conduct

by the states and usurped the administrative structures of the states to implement the goals pursued by the EPA. A number of U.S. Courts of Appeals agreed that EPA had overstepped its authority.[4]

In striking down the EPA rules, the District of Columbia Circuit Court held that

> the exercise of federal power based solely on the commerce clause, cannot against a state's wishes compel it to become involved in administering the details of the regulatory scheme promulgated by the [EPA] Administrator. . . . [T]he attempt to require the state to "establish" each of the retrofit programs and to "evaluate and approve devices for use in this program," . . . is an impermissible encroachment on state sovereignty and goes beyond "regulation" by the Congress. It seeks, under the guise of the commerce power, to substitute compelled state regulation for permissible federal regulation. *If the federal government wants to impose a program under federal authority, it is limited by the re-*

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[4] Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), *vacated sub nom.* EPA v. Brown, 431 U.S. 99 (1977); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *vacated sub nom.* EPA v. Brown, 431 U.S. 99, *reinstated in part and remanded in part sub nom.* District of Columbia v. Costle, 567 F.2d 1091 (D.C. Cir. 1977); Arizona v. EPA, 521 F.2d 825 (9th Cir. 1975), *vacated sub nom.* EPA v. Brown, 431 U.S. 99 (1977); and Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977), *reinstated in part*, 566 F.2d 665 (9th Cir. 1978). *Contra*, Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974) (where the court of appeals relied heavily on Maryland v. Wirtz, 392 U.S. 183 (1968) which was later overruled by the Court in National League of Cities v. Usery, 426 U.S. 833 (1976)).

strictions applicable thereto.

* * *

In essence, the Administrator is here attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program. . . . Under the regulations here, the states are to function merely as departments of the EPA, following EPA guidelines and subject to federal penalties if they refuse to comply or if their regulation of vehicles is ineffective. *We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing unconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist.*

District of Columbia v. Train, 521 F.2d 971, 992 (D.C. Cir. 1975) (emphasis added), *vacated sub nom. EPA v. Brown*, 431 U.S. 99, *reinstated in part and remanded in part sub nom. District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977). *Accord, Brown v. EPA*, 521 F.2d at 839.

The need to respect the states and their place in the federal system is ultimately required by necessary respect for the freedom of the people. The issue of state sovereignty involves more than a struggle for power between competing local and national authorities. State sovereignty must be understood in light of the struggle 200 years ago by men and women desiring to be free, to have self-government and to exercise self-determination. State sovereignty is the result of a grant of power by the people and attains its life from

them. It is from the people that the states receive their legitimacy and their sovereign characteristic. "[S]tate sovereignty in reality is as de Tocqueville expressed, people sovereignty." Lay, *States' Rights: The Emergence of a New Judicial Perspective*, 22 S.D. L. REV. 1, 14 (1977). Thus, interference with the sovereignty of the states amounts to interference with the sovereignty and the rights of the people of the states.

The preservation of individual liberties, as they have meaning in terms of self-government at the state level, is contingent upon the maintenance of "[a] system of government [which] recogniz[es] the inherent sovereignty of each of the partners in our federal system[.]" Noble & Kilroy, *The Constitutionality of a National Public Employee Relations Act: A Case for States' Rights*, 13 VAL. U. L. REV. 1, 31 (1978). PURPA, simply put, is unconstitutional because it presumes an approach to the states which is totally inconsistent with the respect required of the federal government for the states and their citizens.

"[A]s opposed to a national system of government," our federal system provides for " 'diversity, pluralism, protection from arbitrary majoritarianism and overcentralization, and a greater degree of citizen participation.' " Bogen, *Usery Limits on National Interest*, 22 ARIZ. L. REV. 753, 757 (1980) (quoting ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, URBAN AMERICA AND THE FEDERAL SYSTEM, 105 (1969)). "The federal system was chosen to ensure that citizens at the local level would have an institution responsive to their needs as they saw them, although their neighbors in other states might have a different view." *Id.* at 758. Moreover, "[t]he division of lawmaking power between the states and the national government was

designed to encourage each governmental body to check the excesses and abuses of power of the other." *Id.* at 759 (footnote omitted). Through the federal system the people are thus able to maintain a close relationship with their state governments and can be assured that their individual freedoms will be protected from excesses of governmental power. *Id.* at 758-59. The many benefits of the federal system would be lost through PURPA's form of federal regulation.

Appellants argue that PURPA is the antithesis of legislation designed to interfere with the states. They assert that it represents a carefully molded plan to achieve national energy goals while respecting state prerogatives and power. Thus, they see PURPA as a form of "cooperative federalism." Appellants assume that since Congress did not exercise its preemption power, it deliberately deferred to the states. If one believes that preemption otherwise would have been forthcoming, lack of preemption does look like deference to the states.

To have preempted the regulation of utilities, however, would have meant the stirring up of a political hornets' nest. The direct elimination of parts, if not all of the functions of state utility commissions, would have constituted a major absorption of state power. Such a step would have been the subject of intense public debate. The political pitfalls of preemption cannot be underestimated.

At stake in this case are the freedoms and rights of our citizens, not just an abstract struggle for power between governmental entities. The federal system that gave life and breath to the ideals and dreams of the Framers in 1789 continues to protect and nurture our

liberties as citizens. PURPA is a threat to that system. The Constitution must be protected from this novel scheme of national government control.

C. Through Its Protection Of State Sovereignty, The Tenth Amendment Prohibits Congressional Regulatory Mechanisms Such As PURPA.

Even if PURPA is seen as based upon an otherwise proper assertion of the Commerce Power, it transgresses the barrier of state sovereignty and thus represents a violation of the Tenth Amendment. *See Usery*, 426 U.S. at 843 n.14. The Court's *Usery* decision marked a reaffirmation of the continuing vitality of the Tenth Amendment and the system of federalism it recognizes. In striking down a congressional action regulating conditions of employment within state and local governments, the Court concluded that "the dispositive factor" in the unconstitutional exercise of congressional authority was the attempt to regulate actions "by the States in their capacities as sovereign governments." *Usery*, 426 U.S. at 852. Such congressional conduct would have impaired "the States' 'ability to function effectively in a federal system,'" *id.* (quoting *Fry*, 421 U.S. at 547 n.7) and did "not comport with the federal system of government embodied by the Constitution." *Usery*, 426 U.S. at 852.

In determining whether the states had been regulated in their sovereign capacities to the extent of impairment of the federal system, the Court concluded that the congressional action "directly displace[d] the States' freedom to structure integral operations in areas of traditional governmental functions[.]" *Id.* Restating its *Usery* test, the Court in *Virginia Surface*

Mining described a minimum threshold for a successful Tenth Amendment challenge to otherwise valid congressional Commerce Power legislation. *Virginia Surface Mining*, 101 S.Ct. at 2366. PURPA crosses this threshold.

The first step to the threshold is that "the challenged statute regulates the 'States as States.'" *Id.* (quoting *Usery*, 426 U.S. at 854). PURPA's whole scheme of regulation is aimed directly at the states functioning in their governmental capacities. It directs utility regulatory commissions to perform certain actions, requires state courts to subordinate their discretion to federal mandates, and places consequential burdens upon legislative and executive branches of state government.

Unlike the Surface Mining Act which the Court characterized in *Virginia Surface Mining*, 101 S.Ct. at 2366, as "govern[ing] only the activities of coal mine operators who are private individuals and businesses," PURPA surely regulates the "States as States." In contrast to the Surface Mining Act, PURPA *does* compel enforcement conduct by the states, *does* presume the expenditure of state funds, and *does* require participation in a federal regulatory program. Through these requirements PURPA commandeers the powers of "States as States" and requires them to conform to and to enforce a federal regulatory program.

The second step of the *Virginia Surface Mining* test requires that "the federal regulation [challenged] must address matters that are indisputably 'attributes of state sovereignty.'" *Id.* (quoting *Usery*, 426 U.S. at 845). This test is also met by PURPA. PURPA is not aimed at a state's conduct as a provider of energy, as a

food producer, or at similar activities which could be conducted by private enterprise and do not depend upon a commitment of state governing power. Private persons or organizations cannot legislate, set regulatory policy, decide issues of standing or provide judicial remedies. The activities regulated by PURPA all involve exercises of sovereign state governmental power.

In the third step of the *Virginia Surface Mining* test, the Court required that the federal regulation's interference with state sovereignty through direct regulation of the "States as States" had to result in an impairment of the States' ability " 'to structure integral operations in areas of traditional functions.' " *Virginia Surface Mining*, 101 S.Ct. at 2366 (quoting *Usery*, 426 U.S. at 852). Critical to this impairment is that it undermines "the States' 'ability to function effectively in a federal system[.]' " *Usery*, 426 U.S. at 852 (quoting *Fry*, 421 U.S. at 547 n.7).

PURPA undermines the most traditional attribute or function of state government—the power to govern. It interferes with the independence of the states to regulate, to initiate policy, to adjudicate, to legislate. Absent the power these functions presume, states would have no sovereignty, no government and no place in the federal system. By threatening to displace such functions, PURPA is unconstitutional under the *Virginia Surface Mining* test.

However, since PURPA diminishes the most basic characteristic of a sovereign state by its interference with the power to govern, the Court can uphold appellees' challenge to PURPA without reliance upon the three-prong test set out in *Virginia Surface Mining*.

PURPA's undermining of the federal system is more obvious than the wage freeze examined in *Usery* and certainly causes a more direct interference with state prerogatives than the Surface Mining Act.

Neither *Usery* nor *Virginia Surface Mining* involved legislation designed to directly supplant the ability of the states to perform governing acts indispensable to the states' survival in the federal system. Thus, to find congressional interference sufficient to violate the Tenth Amendment and the principles of federalism required a closer scrutiny of the impact of the questioned laws. This scrutiny compelled resort to the elements of the three-prong test, which enabled a close look at how the Congress had actually interfered with the states.

In *Virginia Surface Mining*, the examination ended when the Court saw that the Surface Mining Act was not addressed directly to the states as states, but instead imposed its requirements directly upon private individuals. In *Usery*, the wage freeze was related directly to the area of employment, a function not peculiar to sovereign states. Thus, it was necessary to consider whether sovereign functions were indirectly impaired by the wage freeze.

PURPA, on the other hand, directly imposes its commands on the most sovereign attributes of the states. The Court need not delve into what is a traditional state function and what is not. If the power of governing—the power to initiate policy, to adjudicate, to legislate—is not deserving of Tenth Amendment protection, nothing is. The ultimate question that the three-prong test was designed to determine, after all, is whether the congressional legislation "impair[s] the

States' 'ability to function effectively in a federal system[.]' " *Usery*, 426 U.S. at 852 (citing *Fry*, 421 U.S. at 547 n.7). Where the impairment is so clear, so overwhelming, when it strikes at the heart of sovereign state power without which there would be no government, the Court needs no multiple-prong test to determine that the legislation violates the Constitution.

D. PURPA Cannot Be Justified As A Proper Response To Emergency Conditions.

Despite PURPA's threat to the federal system, appellants contend the problem of energy shortages justified PURPA's enactment and implementation. Appellants rely primarily upon the decision in *Fry*, where this Court upheld the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799, as amended, "as an emergency measure [enacted under the Commerce Clause] to counter severe inflation that threatened the national economy." *Fry*, 421 U.S. at 548. The law went into effect shortly after it was enacted, applied across-the-board to freeze the wages of state and local government employees and was of limited duration. "[T]ailored to combat a national emergency," the law's regulatory means "were carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time." *Usery*, 426 U.S. at 853.

Based solely on the Commerce Clause, PURPA does not meet the severe limitations which are necessarily attendant to true emergency legislation. It provides no immediate and decisive response to an emergency situation. *See United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 581-82 (C.C.P.A. 1975). Instead, the duration

of PURPA's interference with the states is indefinite and its means of response do not assure positive ameliorative action.

"The mere incantation of 'National Emergency,' cannot . . . sound the death-knell of the Constitution." *Id.* at 853. *Accord, United States v. Robel*, 389 U.S. 258, 263 (1967). Where emergencies exist which justify congressional response, Congress must react in a manner which interferes with the independence of the states to the least extent possible. Whatever response is chosen, Congress cannot look to "an emergency . . . [to] call into life a power which has never lived." *Wilson v. New*, 243 U.S. 332, 348 (1917). *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (where the emergency situation of a war did not prevent the Court from applying constitutional restraints to asserted presidential power).

The Court should not sanction congressional use of emergency powers either where true emergencies do not exist or where the powers asserted do not conform to constitutional limits. As the Court has said, an "[e]mergency does not increase granted power or remove or diminish the restrictions upon power granted or reserved." *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934). There is danger to our constitutional system in improper and unjustifiably frequent reliance upon emergency powers. We must avoid such conduct, "lest we grow used to . . . [emergency regulations] as the fittings of ordinary existence." *Bauer v. U.S.*, 244 F.2d 794, 797 (9th Cir. 1957).

CONCLUSION

In its approach to federal regulation of the states, PURPA is a threat to the states' "separate and independent existence." *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911) (quoting *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868)). The states were not designed as subordinate federal agencies. To allow PURPA to survive would embolden Congress to apply this regulatory scheme again and again. The end result can be imagined easily. When state governments are left with memories instead of functions, there will be no federal system.

The gate must be closed to the forbidden path Congress has chosen. The National Government must not be allowed to "devour the essentials of state sovereignty . . . ." *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting). Southeastern urges the Court to affirm the judgment of the district court.

Respectfully submitted,

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